



VERMONT LAW SCHOOL INSTITUTE FOR ENERGY AND THE ENVIRONMENT

MEMORANDUM

To: NEEP-HELIX
From: Vermont Law School, Institute for Energy and the Environment
Date: April 6, 2017
Re: NEEP-HELIX Task 4.5 Consent Mechanisms

I. Questions

This memo seeks to answer the following questions:

1. What steps will HELIX need to take to secure access the existing and future home energy rating/score label data?
2. Why will it need to take those steps?
3. What are the recommendations for how to move forward with the consent mechanisms?

II. Recommendations

Task Memo 4.1 explores the contractual obligations between parties involved at every stage of the rating system process.¹ For example, regarding HES, all Partners must conclude a Partnership Agreement and submit a Partnership Implementation Plan with the Department of Energy. This partnership agreement touches on confidential information, but also outlines the terms of the partnership.² The memo concludes that the contracts represent the law of the Parties. Thus, a first step in populating HELIX and auto-populating the

¹ Memo 4.1, p. 4.

² Memo 4.1, p. 22.

MLS with HES data is addressing the contractual obligations at each level while paying attention also to the applicable laws and regulations. If no contracts have been concluded to grant third parties access to confidential information or the contract in place does not contain a customer waiver clause, then the natural next step is to develop a mechanism for obtaining customer consent for sharing the data. This memo provides the backdrop for developing such a mechanism.³

To secure access to past rating data, HELIX will need to contact customers to obtain their affirmative consent where individual consent is required, i.e. where the customer owns the data (HES, HERS, ENERGY STAR, NGBS, and potentially Passive House). This may require going through a separate entity (e.g. the Department of Energy for HES data) if individual contact information is not made public. HELIX will likely want to pursue an opt-in mechanism—which would require this affirmative consent—because data-holding entities like RESNET may prefer the higher level of transparency associated with this approach. Further, affirmative opt-in mechanisms better satisfy the requirement set by RESNET that customers give consent in writing.

For contracts where the data-holding entity controls access to information, HELIX will need to obtain organizational consent. Although LEED for Homes does not own the relevant data, HELIX should still seek USGBC’s approval before using that data. This will require organizational consent. HELIX will need to determine whether Passive House requires organizational or individual consent, as this is still unclear. The first step in that endeavor will be requesting a PHIUS+ Certification Contract.

In moving forward with consent mechanisms, HELIX should contact each data-collecting entity to negotiate how to contact existing customers. This is necessary in getting permission to access customer ratings or scores. HELIX should also consider how it should frame the purpose of the data collection to convince those customers to give permission. HELIX should also contact each data-collecting entity and discuss their preference for opt-in or opt-out language in contracts between homeowners and assessors.

III. Analysis

The analysis for this memorandum (1) develops a mechanism that would allow HELIX to include in the database information on past ratings and scores; and (2) provides a table showing the different rating and score systems, including the type of information gathered, what information is already publicly disclosed, contracts and standards in place that address privacy concerns, and examples

³ Memo 4.1, p. 46.

of amending clauses that allow the data-holding entities to share information for the purposes of the HELIX project. The examples of amending clauses in the comparative table are abridged and refer to Task 4.4 Memo for more comprehensive examples. Nevertheless, the consent clause must provide an explicit description of what the data will be used for and how its use will be restricted to protect customer privacy, which the examples in the comparative table demonstrate.

1. What mechanism allows HELIX to include database information on past ratings and scores?

For HELIX to include database information on past ratings and scores, it would need to administer either (a) an opt-in or (b) an opt-out consent form to customers (in the case of HES, HERS, ENERGY STAR and NGBS and potentially Passive House) or to the organization collecting the data (in the case of LEED and potentially Passive House).⁴ Opt-in consent requires an affirmative choice from the customer to share his or her data,⁵ whereas opt-out consent would notify customers and create a default setting where all customers agree to share their data unless they choose not to participate.⁶ Because these mechanisms would be for *past* ratings and scores and will not be integrated into existing contracts looking forward, HELIX would need to contact all customers and/or organizations to obtain their consent. HELIX will need to negotiate how it can contact existing customers to receive permission to access past ratings. Opt-in approaches typically result in lower participation rates, but data-holding entities like RESNET may prefer the higher level of transparency associated with this approach.⁷

HES Data

The Department of Energy stores data from HES scores and reports. Because the Department of Energy will not disclose confidential information to a third party unless the customer has given his or her written consent, HELIX would need to contact HES customers through the Department of Energy. This is also because the Department of Energy does not disclose the name or specific address of a project, but only portrays information in the aggregate. Because the Department of Energy cannot unilaterally reveal this information, the partners of the Department would have the burden of contacting each customer to obtain their consent. Because the customer owns

⁴ See Table *infra* for more information on which entities require individual vs. organizational consent.

⁵ Memo 4.4, p. 9.

⁶ Memo 4.4, p. 9.

⁷ Memo 4.4, p. 10.

his or her HES information, the Department's partners cannot use an opt-out mechanism that would deprive customers of their property. HELIX would have to go through the middleman of the DOE, which might make it cumbersome to obtain past HES data.

HERS Data

The memorandum dated March 1, 2017 discusses the searchable database of HERS Index Scores and whether HELIX requires additional consent mechanisms to collect existing and future HERS scores.⁸ The memo concludes that RESNET permits sharing the HERS Index Scores, which give broad, comparative information. However, RESNET does not disclose the ratings, which give in-depth energy performance assessments that present sensitive information that raters, home energy survey professionals, and ratings organizations are prohibited from disclosing.⁹ Written consent from customers is required before RESNET can disclose those ratings.

In releasing HERS Index Scores, RESNET therefore makes the following available to the public: (1) the address of home rated; (2) the name of company that rated the house; (3) the date of the rating; and (4) the HERS Index Score.¹⁰ Because RESNET makes these addresses available, it could shift the burden to HELIX to contact each customer to obtain HERS data. The opt-in mechanism would satisfy RESNET's requirement (under the Rating and Home Energy Survey Code of Ethics) that customers give written permission before RESNET releases HERS data. The opt-out mechanism could not satisfy this requirement because RESNET requires an affirmative choice in writing.

ENERGY STAR

Home Energy Raters seeking to participate in the ENERGY STAR Certified Homes Program have to be certified by RESNET. Therefore, these raters also must abide by the Rating and Home Energy Survey Code of Ethics. The opt-in mechanism would satisfy the requirement that customers give written permission before RESNET releases HERS data. The opt-out mechanism could not satisfy this requirement because RESNET requires an affirmative choice in writing. Because ENERGY STAR partners have to provide the EPA with certain documentation on request, it is likely that no ENERGY STAR data is public.¹¹ Thus, the burden would fall on ENERGY STAR partners to contact each individual customer to realize the opt-in mechanism.

⁸ Memo Re RESNET Public Information Management, Mar. 1, 2017.

⁹ Memo Re RESNET Public Information Management, Mar. 1, 2017, p. 2.

¹⁰ See Table *infra*.

¹¹ "Upon request, partner must provide EPA with relevant documentation regarding any home or homes certified as ENERGY STAR (or potentially represented to homebuyers as such), including, but not limited to, Home Energy Rating (HERS) reports, ENERGY STAR inspection checklists, and promotional materials."

Nevertheless, ENERGY STAR obligates its customers to promote ENERGY STAR certifications. By publishing ENERGY STAR data, customers can meet this requirement. HELIX should emphasize this ENERGY STAR policy when approaching ENERGY STAR partners.

LEED for Homes

LEED-certified homes are included in the public LEED project directory—an open access, searchable directory.¹² HELIX would not need an opt-in or opt-out mechanism from the individual customers, but would likely want to get approval from the U.S. Green Building Council (USGBC) before using past information from the LEED rating system.¹³ Such approval would require an opt-in mechanism addressed to USGBC.

Passive House

As noted in the table below, it is unclear whether HELIX would require organizational or individual consent for past Passive House data.¹⁴ However, because the location of the project is disclosed to the public, PHIUS could shift the burden of contacting each customer to HELIX if individual consent is necessary. The same opt-in mechanism would apply regardless of whether HELIX required individual or organizational consent.

National Green Building Standard

Under the National Green Building Standard, the client is responsible for holding the relevant data and has a duty to maintain data and supporting documentation for three years.¹⁵ Even though the Client has the responsibility to keep data for 3 years, it does not necessarily mean that Home Innovation does not have the data. Home Innovation maintains an online database of certified homes.¹⁶ Nevertheless, the client must provide, upon request, access to the project(s) and supporting documentation. For this reason, HELIX could contact each client individually, especially since NGBS makes the location of projects public. HELIX could use an opt-in

<https://www.energystar.gov/index.cfm?fuseaction=opa.showESTermsCommitments&CFID=61288603&CFTOKEN=9ee84961f192dac2-14E2FCAE-033F-41B4-0A73EA33565AD41D>.

¹² Memo 4.4, p. 14.

¹³ Memo 4.4, p. 15.

¹⁴ Memo 4.4 p. 15.

¹⁵ NGBS Green Certification Multifamily Client Agreement, cl. 7,

http://www.homeinnovation.com/services/certification/green_homes/~media/Files/Certification/Green%20Building/NGBS-Builders-Resource-Guide.pdf.

¹⁶ National Green Building Standard Memo, p. 8.

mechanism to obtain the data from these projects. NGBS clients are typically not the homeowner, but builders or architects that use this information to market their properties or certain services they provide. As a result, HELIX will likely succeed in obtaining this information, which can indirectly publish the properties or services of NGBS clients through other channels.

2. Comparative table: HES, HERS, ENERGY STAR, LEED for Homes, Passive House, and National Green Building Standard.

Rating/Score/Labeling System	Information Gathered	Information Publicly Disclosed	Contracts, Standards, Code of Ethics/Clauses	Examples of Amending Clauses
Home Energy Score (HES)	House energy performance/efficiency recommendations (40 pieces of information): <ol style="list-style-type: none"> 1. Score (includes estimated annual savings)¹⁷ 2. Home facts (the house’s envelope, not how occupants use the home)¹⁸ 3. Recommendations: cost-effective repairs¹⁹ 	Aggregate form of data to compare homes locally and nationally; HES can effectively compare data in this way because it normalizes differences in weather patterns across the United States. DOE contractually obligated to not share any information except in aggregate form <u>Not</u> publicly disclosed: individualized customer information	DOE Partners have access to DOE database and can only access the data scored by qualified assessors working through that partner; assessors have access to data for surveys they conducted. DOE will not disclose confidential information to a third party unless: (a) Mutually agreed upon in writing by partner; execution of mutually acceptable nondisclosure agreement; or	<i>Individual consent: The customer hereby consents to allow HELIX to collect and store the following specific data fields, namely [THE DATA FIELDS TO BE INSERTED] in order to be disclosed through accepted and secure methods of data transportation, for the specific purpose of publishing it on the HELIX database, which will auto-pop the local Multiple Listing Service (MLS).²¹ The customer hereby understands that the data</i>

¹⁷ See Memo 4.1, pp. 10.

¹⁸ See Memo 4.1, p. 11–12.

¹⁹ See Memo 4.1, p. 12.

²¹ See Memo 4.4 p. 11–12 for more extensive contract language. This portion of the table only portrays the opt-in mechanism required to give HELIX access to HES data.

			<p>(b) When DOE is required by law Assessors bound by contracts from partners they work with²⁰</p> <p>Assessor will conclude Home Inspection Agreement, which is for use of homeowner only, but assessor may discuss observations with real estate agents, owners, repair persons, other interested parties</p>	<p><i>collected includes more than what HES publicly discloses.</i></p>
Home Energy Rating System (HERS)	<ol style="list-style-type: none"> 1. Estimated annual purchased energy consumption; 2. Estimated annual energy cost; 3. Street address; 4. Rater information; 5. Numeric rating score with information on home's energy features²² 	<ol style="list-style-type: none"> 1. Address of home rated; 2. Name of company that rated the house; 3. Date of rating; 4. HERS Index Score 	<p>RESNET Code of Ethics: no disclosure of information concerning rating/home energy survey for a specific home other than to the client unless there is written permission²³ (applies to raters, Home Energy Survey Professionals, rating organizations)</p>	<p><i>Individual consent: The customer hereby consents to allow HELIX to collect and store the following specific data fields, namely [THE DATA FIELDS TO BE INSERTED] in order to be disclosed through accepted and secure methods of data transportation, for the specific purpose of publishing it on the HELIX database, which will auto-pop the local Multiple Listing Service (MLS).</i>²⁴</p>

²⁰ For example, the ASHI Code of Ethics (no disclosure of inspection results or client information without client approval); the BPI code of ethics (no disclosure of private, confidential information about any client for use of third parties whose services have not been explicitly requested by homeowner/occupant; and InterNachi (no disclosure unless necessary to protect safety of others or comply with law *and* client has been made aware of what information will be released, to whom, and for what purpose, *and* client has provided explicit, prior written consent. *See* Memo 4.1, p. 24–26.

²² Memo 4.1, pp. 13–14.

²³ Memo 4.1, pp. 27.

²⁴ *See* Memo 4.4 p. 11–12 for more extensive contract language. This portion of the table only portrays the opt-in mechanism required to give HELIX access to HES data.

				<i>The customer hereby understands that the data collected includes more than what HERS publicly discloses.</i>
ENERGY STAR Certified Homes	<ol style="list-style-type: none"> 1. HERS score (can generate certificates with or without HERS index²⁵); 2. Thermal enclosure; 3. HVAC quality; 4. Water management; 5. Efficient lighting/appliances (included on ENERGY STAR inspection checklists)²⁶ 	Certified party has a requirement to show ENERGY STAR certification because partners have to provide EPA with certain documentation on request, safe to assume that no information is public. ²⁷	<p>Home Energy Raters seeking to participate in the ENERGY STAR Certified Homes Program have to be certified RESNET; therefore, these raters also must abide by the Rating and Home Energy Survey Code of Ethics (see above)²⁸</p> <p>Contractual provisions pertain more to the parties receiving certification and their duties to take action in certain areas and submit a program outlining specific measures that will help promote ENERGY STAR.²⁹ However, partners have to provide EPA with relevant documentation about any home (i.e. HERS reports,</p>	<p><i>Individual consent:</i> <i>The customer hereby consents to allow HELIX to collect and store the following specific data fields, namely [THE DATA FIELDS TO BE INSERTED] in order to be disclosed through accepted and secure methods of data transportation, for the specific purpose of publishing it on the HELIX database, which will auto-pop the local Multiple Listing Service (MLS).³¹</i></p> <p><i>Disclosing this data is consistent with duties to help promote ENERGY STAR.</i></p>

²⁵ Memo 4.1, pp. 15.

²⁶ Memo 4.1, pp. 15–16.

²⁷ See <https://www.energystar.gov/index.cfm?fuseaction=opa.showESTermsCommitments&CFID=61288603&CFTOKEN=9ee84961f192dac2-14E2FCAE-033F-41B4-0A73EA33565AD41D>.

²⁸ Memo 4.4, p. 13.

²⁹ Memo 4.1, p. 27.

³¹ See Memo 4.4 p. 11–12 for more extensive contract language. This portion of the table only portrays the opt-in mechanism required to give HELIX access to HES data.

			ENERGY STAR inspection checklists). ³⁰	
LEED for Homes	LEED v4 Checklist ³² requires information on <ol style="list-style-type: none"> 1. Construction activity; 2. Water use; 3. Materials and resources; 4. Indoor environmental quality 	<ol style="list-style-type: none"> 1. Project name; 2. Project ID; 3. Physical address; 4. Total points earned; 5. Gross square footage; 6. Total property area; 7. Project type, etc.³³ (all included in project directory) 	<p>LEED-certified homes included in public LEED project directory (an open access, searchable directory)³⁴</p> <p>Can opt out of project directory and become a private project.</p> <p>Green Business Certification Inc. is granted license to access, view, reproduce, use all project information (including information related to the applicant); GBCI and USGBC (U.S. Green Building Council) can also use, reproduce, publish project information “as described in the Certification Guide”³⁵; nothing prevents USGBC or GBCI from disclosing information; in sole discretion to disclose if for public safety. (This is included in the Certification Agreement)</p>	<p><i>Organizational consent: U.S. Green Building Council [or Green Business Certification, Inc.] hereby consents to allow HELIX to collect and store the following specific data fields, namely [THE DATA FIELDS TO BE INSERTED] in order to be disclosed through accepted and secure methods of data transportation, for the specific purpose of publishing it on the HELIX database, which will auto-pop the local Multiple Listing Service (MLS). Any portion of the rating system published by HELIX will attribute permission, authorship and copyright to the U.S. Green Building Council.</i></p>

³⁰ See <https://www.energystar.gov/index.cfm?fuseaction=opa.showESTermsCommitments&CFID=61288603&CFTOKEN=9ee84961f192dac2-14E2FCAE-033F-41B4-0A73EA33565AD41D>

³² See <http://www.usgbc.org/resources/leed-v4-homes-design-and-construction-checklist>

³³ See Memo 4.1, p. 31.

³⁴ Memo 4.4, p. 14.

³⁵ Memo 4.1, p. 30.

			USGBC grants a limited, royalty-free, nonexclusive, revocable license to individuals or entities seeking to use, reproduce, and/or display any portion of the rating system appearing on the website so long as permission, authorship and copyright are properly attributed to the USGBC Approval from USGBC recommended before using information from the LEED rating system ³⁶	
Passive House	<ol style="list-style-type: none"> 1. HVAC; B 2. Building permit date; 3. HERS index; 4. Building envelope; 5. Ventilation; 6. Heating/cooling; 7. Domestic hot water; 8. Lights and appliances; 9. Water management; 10. Air tightness; 11. Exterior photos; 12. Photos of insulation 	<ol style="list-style-type: none"> 1. Project status; 2. Lead Certified Passive House Consultant; 3. Builder; 4. Location; 5. Construction type; 6. Building function; 7. Floor area; 8. Project type³⁷ <p>→available once project is pre-certified³⁸</p>	Use login information to get more extensive data from certified projects database; PHIUS+ Certification Contract signed by applicant ³⁹	Unclear whether organizational or individual consent required. ⁴⁰ If organizational consent is required, see example above for LEED (replacing USGBC with PHIUS). If individual consent is required, see examples for HES and HERS.
National Green Building Standard	<ol style="list-style-type: none"> 1. Lot Design, Preparation, and Development; 	<ol style="list-style-type: none"> 1. Client's participation in NGBS Green 	Client responsible for holding data; the Client must provide, upon request, access to the	<i>Individual consent: The customer hereby consents to allow HELIX to collect and</i>

³⁶ Memo 4.4, p. 15.

³⁷ Memo 4.1, p. 18.

³⁸ <http://www.phius.org/phius-certification-for-buildings-and-products/phius-2015-project-certification/submit-a-project-for-certification>

³⁹ The Certification Contract is not available online, but must be requested. See <http://www.phius.org/phius-certification-for-buildings-and-products/phius-2015-project-certification/submit-a-project-for-certification>.

⁴⁰ Memo 4.4 p. 15.

	<ol style="list-style-type: none"> 2. Resource efficiency; 3. Energy efficiency; 4. Water efficiency; 5. Indoor environmental quality; 6. Operation, Maintenance and Building Owner Education 	<ol style="list-style-type: none"> 2. Location of certified projects⁴¹ 3. Results of verification process could be made public⁴² 	<p>project(s) and supporting documentation regarding the certification process⁴³</p>	<p><i>store the following specific data fields, namely [THE DATA FIELDS TO BE INSERTED] in order to be disclosed through accepted and secure methods of data transportation, for the specific purpose of publishing it on the HELIX database, which will auto-pop the local Multiple Listing Service (MLS).</i>⁴⁴</p> <p><i>By giving consent, the customer hereby understands that the data collected includes more than what NGBS publicly discloses on its database and includes individualized customer information.</i></p>
--	--	--	---	---

4. Going forward

Moving forward, HELIX will need to consider and answer the following questions:

1. Whether Passive House information requires organizational or individual consent;
2. How to contact existing customers to receive their permission to access past ratings, scores, and labels;

⁴¹ NGBS Green Certification Multifamily Client Agreement, cl. 13, http://www.homeinnovation.com/services/certification/green_homes/~media/Files/Certification/Green%20Building/NGBS-Builders-Resource-Guide.pdf.

⁴² See National Green Building Standard Memo, p. 8.

⁴³ NGBS Green Certification Multifamily Client Agreement, cl. 7, 14 http://www.homeinnovation.com/services/certification/green_homes/~media/Files/Certification/Green%20Building/NGBS-Builders-Resource-Guide.pdf.

⁴⁴ See Memo 4.4 p. 11–12 for more extensive contract language. This portion of the table only gives the pithy words of the opt-in mechanism required to give HELIX access to HES data.

3. How to frame the purpose of the data collection to convince customers to give permission and opt in to the data collection;
4. Whether to insert opt-out or opt-in language into contracts between homeowners and assessors for present and future ratings.

Acknowledgements and Disclaimers

This material is based upon work supported by a Department of Energy Office of Energy Efficiency and Renewable Energy Cities Leading through Energy Analysis and Planning (Cities- LEAP) grant.

This report was prepared as an account of work sponsored by an agency of the United States Government. Neither the United States Government nor any agency thereof, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise does not necessarily constitute or imply its endorsement, recommendation, or favoring by the United States Government or any agency thereof. The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States Government or any agency thereof.

The work of the Vermont Law School Institute for Energy and the Environment is intended to assist and expedite professional assessment. The IEE is an academic organization and its work does not purport to be, and is not the equivalent of, the work of a licensed professional with expertise in this area. The IEE does not provide legal services, advice, or consultation. Any legal assistance must be the subject of a separate agreement with a licensed attorney. Before making significant decisions based on this work, it would be appropriate to consider consultation with a licensed professional with expertise in this field.